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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/566,872	02/02/2006	Marvin A. Sackner	53000-111PUS	9574

27799 7590 02/06/2007  
COHEN, PONTANI, LIEBERMAN & PAVANE  
551 FIFTH AVENUE  
SUITE 1210  
NEW YORK, NY 10176

EXAMINER
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TRETTEL, MICHAEL

ART UNIT	PAPER NUMBER
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3673

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	02/06/2007	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

## Office Action Summary

**Application No.**

10/566,872

**Applicant(s)**

SACKNER, MARVIN A.

**Examiner**

Michael Trettel

**Art Unit**

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 11/30/06.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-97 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-97 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date 2/2/06
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## DETAILED ACTION

### *Claim Rejections - 35 USC § 101*

35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

Claims 18 to 56 and 59 to 97 are rejected under 35 U.S.C. 101 because the claimed invention is not supported by either a specific and substantial asserted utility or a well established utility. See MPEP sections 2107.01-2107.03. The applicant's claimed utility for the invention appears to lack credibility in view of the prior art, and does not appear to be well supported by the specification and the prior art as a whole. While the prior art and the specification provides reasonable support for the assertion that a reciprocating motion platform of this type would serve to release nitric oxide within a patient undergoing treatment there does not appear to be support within the specification for the assertion that the invention can provide effective treatment or treatments as detailed in the claims listed above. The assertion that the device can reverse or slow the aging process as set forth in claims 20 and 52, can be used to treat a laundry list of ailments as detailed in claims 19 and 51, provides better viability for donor organs as set forth in claim 21, preconditions an entire group of internal organs as set forth in claims 35 to 39, and so forth does not appear to be credible absent any supporting evidence to establish that this mode of treatment is effective. See MPEP 2107.02(V):

In appropriate situations the Office may require an applicant to substantiate an asserted utility for a claimed invention. See *In re Pottier*, 376 F.2d 328, 330, 153 USPQ 407, 408 (CCPA 1967) ("When the operativeness of any process would be deemed unlikely by one of ordinary

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skill in the art, it is not improper for the examiner to call for evidence of operativeness.”). See also *In re Jolles*, 628 F.2d 1322, 1327, 206 USPQ 885, 890 (CCPA 1980); *In re Citron*, 325 F.2d 248, 139 USPQ 516 (CCPA 1963); *In re Novak*, 306 F.2d 924, 928, 134 USPQ 335, 337 (CCPA 1962). In *In re Citron*, the court held that when an “alleged utility appears to be incredible in the light of the knowledge of the art, or factually misleading, applicant must establish the asserted utility by acceptable proof.” 325 F.2d at 253, 139 USPQ at 520. The court approved of the board’s decision which affirmed the rejection under 35 U.S.C. 101 “in view of the art knowledge of the lack of a cure for cancer and the absence of any clinical data to substantiate the allegation.” 325 F.2d at 252, 139 USPQ at 519.

The applicant should provide evidence to support the claimed assertion that the device can provide utility for the claimed modes of treatment.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claim 16 is rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over any one of claims 45, 46, 62, 63, or 64 of U.S. Patent No. 7,111,346. Although the conflicting claims are not identical, they are not patentably distinct from each other because the subject matter of any one of claims 45, 46, 62, 63, or 64 fully encompass the subject matter of claim 16. In effect, claim 16 is anticipated by any one of claims 45, 46, 62, 63, or 64 of the '346 patent. Since claim 16 is anticipated (fully encompassed) by the earlier claims it is not patentably distinct from the earlier claims, regardless of any additional subject matter present in the claims 45, 46, or 62-64.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 57 to 97 are rejected under 35 U.S.C. 102(b) as being anticipated by Blok (US 3,654,918). Blok et al shows a reciprocating table 30 used to aid cardiovascular circulation in a supine patient laying upon the table. The table comprises a support frame 10 with a foot 12 an upper surface 14 enclosed by upright ends 16, 18. Side covers 17, 18 enclose the interior of the frame. Support beams 20 are provided inside the frame 10 to support a hydraulic motor 58, pump 52, accumulator 56, and filter 54 which are used to operate a reciprocating servomotor 40 attached to the frame above the upper surface 14. Mounting brackets 22, 24, 26, and 28 are attached to the upper surface 14 to support the servomotor 40 and interlaced bifurcated springs

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32, 34. The springs 32, 34 support the table top 31 and bias the table top towards a centered position relative to the frame 10. The servomotor can be operated to reciprocate the table top 31 relative to the frame 10 and thereby reciprocate a patient laying upon the surface of the table. As set forth in column 1 this motion helps in cardiovascular circulation. Since the table would inherently cause release of nitric oxide within a patient when it is reciprocated it then follows that the alleged therapeutic benefits set forth in the claims would inherently be produced by use of the table.

### *Claim Rejections - 35 USC § 103*

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1 to 56 are rejected under 35 U.S.C. 103(a) as being unpatentable over Blok et al (US 3,654,918) in view of Hemmings (US 2,641,252). As set forth above, Blok shows all of the structure claimed except for the footboard and cast shoes attached to a foot end of the table. Hemmings teaches that a reciprocating patient table can include a footboard formed by an elongated panel 16 with wear panels 40 and mounting plate 50 which have a pair of cast shoes 44 attached to an upper surface of plate 50 by hinges 48. The shoes 44 help secure the patient to the reciprocating table top and assure that the patient will move with the top as it is reciprocated. The shoes are shown as being formed in a fairly conventional form with an opening that is secured by a tie type fastening. It would have been obvious to one of ordinary skill in the art to

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have provided the Blok et al reciprocating table with a pair of cast shoes 44 secured by a footboard as is taught by Hemmings. The motivation would have been to secure the patient to the table top and to assure that the patient moves in conjunction with the table top during reciprocation, since the shoes act as a means for directly securing the patient to the table top. Since the table would inherently cause release of nitric oxide within a patient when it is reciprocated it then follows that the alleged therapeutic benefits set forth in the claims would inherently be produced by use of the table.

### *Conclusion*

Arntzenius (US 3,532,089), Gilbert (US 2,856,916), Russell (US 3,455,297), and Sackner et al (US 6,155,976) show reciprocating support platforms which are of particular interest.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael Trettel whose telephone number is (571) 272-7052. The examiner can normally be reached on Monday, Tuesday, Thursday, or Friday from 7.30 am to 5.00 pm.


If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Patricia Engle, can be reached on (571) 272-6660. The fax phone number for the organization where this application or proceeding is assigned is (571)-273-8300.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-1113.

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A handwritten signature in black ink, appearing to read "Michael Trettel", with a long horizontal flourish extending to the right.

Michael Trettel

Primary Examiner

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